Supreme Court, U.S.
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No. 91-1184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL ERICKSON, *et al.*,

Petitioners,

v.

DESERT PALACE, INC., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Nevada law prohibits any civil cause of action to recover a gaming debt not evidenced by a credit instrument, and in its stead provides an administrative remedy followed by state court judicial review. The question presented here is whether application of this state law by a federal court exercising diversity jurisdiction, to hold that a claim for an unpaid slot machine jackpot based on an allegation of fraud and cheating fails to state a claim upon which relief can be granted, (a) involves anything more than a pure determination of state law, to which this Court has a practice of deferring, (b) conflicts with the settled law of this Court or the federal courts of appeals, or (c) deprives the claimant of any right under federal law?

STATEMENT UNDER RULE 29.1

Pursuant to Rule 29.1, respondents Desert Palace, Inc. and Caesars Palace Corp., a Delaware corporation (together "Caesars"), state as follows: Desert Palace, Inc. is the wholly owned subsidiary of Caesars Palace Corp., which in turn is the wholly owned subsidiary of Caesars World, Inc. Respondents Desert Palace, Inc. and Caesars Palace Corp. do not have any subsidiaries that are not wholly owned. There is no such entity as Caesars Palace, a Nevada corporation, which also is named as a respondent.

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STATUTES INVOLVED

Section 463.361 of the Nevada Revised Statutes provides:

> **463.361 Enforceability of gaming debts.**
>
> 1. Except as provided in NRS 463.361 to 463.366, inclusive, gaming debts not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action.
>
> 2. A claim by a patron of a licensee for payment of a gaming debt not evidenced by a credit instrument may be resolved by the [state gaming control] board in accordance with NRS 463.362 to 463.366, inclusive.

Sections 463.362 through 463.3668 of the Nevada Revised Statutes provide an administrative remedy for claims of unpaid gambling winnings and permit state court judicial review of such claims. These sections are set forth in their entirety in the appendix to the petition for writ of certiorari, at pages G1-G10.[1]

STATEMENT OF THE CASE

Overview

This case involves a claim by petitioners Russell, Beth and Kirk Erickson ("the Ericksons") to a gaming debt not evidenced by a credit instrument—an

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[1] All references to the petition for writ of certiorari in this case will be abbreviated "Petition" followed by the page(s) cited; all references to the appendix to the Petition will be abbreviated "Pet. App." followed by the page(s) cited.

unpaid slot machine jackpot. By statute, such claims are void and unenforceable and cannot be pursued in Nevada's courts. *See* NRS 463.361, *reprinted supra* at 1. Instead, Nevada law provides an administrative remedy followed by state court judicial review. *See* NRS 463.361 through 463.3668; Pet. App., G1-G10.

As described in more detail below, the Ericksons thoroughly pursued their claim to the jackpot administratively and in state court on judicial review, and lost. Concurrently, they pursued an action in federal court for the jackpot, plus consequential and punitive damages, asserting, among other things, what they describe as a common law claim of fraud and cheating. The federal district court, exercising diversity jurisdiction, held that the Ericksons' asserted common law claim was subsumed in and barred by the Nevada statutes cited above, and that the Ericksons were limited to the administrative/judicial review remedy provided in those statutes. The court of appeals affirmed.

The Ericksons now ask this Court to review the decisions of the federal district court and the court of appeals.

The Jackpot

Respondent Desert Palace, Inc. operates Caesars Palace, a licensed casino in Las Vegas, Nevada. On August 5, 1987, while playing a slot machine in Caesars Palace, Kirk Erickson aligned a jackpot worth $1,061,812. At the time, Kirk was just 19 years old. Under Nevada law, it is unlawful for any person under 21 years of age to play a slot machine. *See* NRS 463.350.

Soon after the jackpot was aligned, agents of the State Gaming Control Board ("Board") came to Caesars Palace to investigate. The agents were called after executives of Caesars Palace had reviewed a videotape and discovered that the person claiming the jackpot, Russell Erickson (Kirk's father), was not the person who had played the slot machine.

In response to questioning by the agents, Russell Erickson insisted he was the one who had aligned the jackpot. Only after the agents told Russell about the videotape and advised him it was a felony under Nevada law to claim the jackpot of another, *see* NRS 465.070(3) and 465.088(1), did Russell admit it was Kirk who had played the slot machine.

The agents explained to Russell that he could not claim the jackpot because it would be a felony under Nevada law, and that Kirk could not claim the jackpot because he was underage.

The Proceedings Under State Law

On August 7, 1987, the Ericksons filed a formal claim to the jackpot with the Board under NRS 463.362(1). On August 27, 1987, pursuant to NRS 463.362(2), one of the agents who had investigated the jackpot issued a written decision denying the Ericksons' claim.

On September 15, 1987, pursuant to NRS 463.363(1), the Ericksons petitioned the Board for a hearing to reconsider the agent's decision. The Ericksons claimed they were entitled to the jackpot under theories of breach of contract, unjust enrichment and fraud.

On August 23 and 24, 1988, following extensive briefing and 11 months of discovery, a full evidentiary hearing pursuant to NRS 463.363(6) and (7) was conducted before the Board's hearing examiner. On November 9, 1988, pursuant to NRS 463.364(2), the Board issued an 18-page Decision and Order sustaining the decision of its agent. *See* Pet. App., B1-B16.

The principal ground for the Decision and Order was that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson. Pet. App., B4-B8. As alternative bases for the Decision and Order, the Board also analyzed and rejected the Ericksons' theories of breach of contract, unjust enrichment and fraud. *Id.*, B8-B15. In doing so, the Board repeatedly found there was no evidence in the record to show that Caesars Palace knew or had reason to believe Kirk Erickson was under 21 years of age, or made any false representation to Kirk or his parents regarding the legal age for gambling in Nevada. *Id.*

> For example, Caesars did not acknowledge to Kirk that he was underage and then assure him that he could gamble with impunity, and that Caesars would not set up his age as a defense to Kirk's claim. Caesars could not even be said to have made these representations by implication, because, as noted above, Caesars had no reason to know that Kirk was underage, due to Kirk's mature appearance.

Id., B12.

The Board also found that the Ericksons engaged in "deceptive behavior" after Kirk aligned the jackpot, from which it could infer that Kirk and his par-

ents knew Kirk was gambling illegally. Pet.App., B11 n.1. Finally, the Board concluded that Kirk's parents, Russell and Beth Erickson, lacked standing to claim the jackpot. *Id.*, B15.

The Ericksons timely petitioned the state district court for judicial review pursuant to NRS 463.3662. On July 3, 1989, following briefing and oral argument, the court entered an order pursuant to NRS 463.3666, affirming the Decision and Order of the Board. *See* Pet. App., D1-D3. In a decision that had been rendered from the bench at the close of oral argument six days earlier, the court agreed that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson.[2] The court also observed:

> Concerning the question of what actually occurred on the premises at the time of the winning of the jackpot, I would concede, as I think probably the hearings [sic] examiner would concede, that a casino knowingly allowing a minor to gamble and lose, and then disallowing the collection of any winnings the minor would have, would be fraudulent and would be reprehensible. In this matter, there is no evidence of that.

Addendum, 2a.

Pursuant to NRS 463.3668, the Ericksons timely petitioned the Nevada Supreme Court for judicial review. On May 21, 1990, the Nevada Supreme Court entered an order dismissing the petition. *See* Pet. App., E1-E3. The Nevada Supreme Court agreed with

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[2] A transcript of the state district court judge's remarks from the bench is included in the addendum to this brief.

the Board and the district court that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson. Pet. App., E1-E2. It also agreed there was no "evidence showing that [Caesars] knowingly allowed Kirk Erickson to gamble while underage." *Id.*, E2.

The Federal Action

On August 11, 1988, less than two weeks before the Board hearing, the Ericksons filed a complaint in the United States District Court for the District of Nevada against Caesars, the Board, the two agents who had investigated the jackpot, and the State of Nevada (the defendants other than Caesars will be referred to collectively as "the State defendants").

In the complaint, the Ericksons alleged jurisdiction based on diversity of citizenship and asserted five claims for relief. The first four claims were for payment of the jackpot based on theories of breach of contract, quasi-contract, fraud and cheating, and interference with contract, respectively. The fifth claim for relief sought a declaratory judgment finding NRS 463.350 unconstitutional as implemented and enforced.[3]

By order entered March 9, 1989, the federal district court granted the motions of Caesars and the State defendants to dismiss the complaint. *See* Pet. App., C1-C4. Citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the court determined that, since diversity jurisdiction was asserted, Nevada's substantive law controlled. Pet. App., C2. Then, relying on subsection 1 of NRS 463.361, which bars "any . . .

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[3] The Ericksons' complaint also is included in the addendum to this brief.

civil cause of action" to recover a gaming debt not evidenced by a credit instrument, the court held that the first four claims for relief failed to state a claim upon which relief could be granted. Pet. App., C2.

The district court stated: "[P]laintiffs cannot maintain a civil action to recover a jackpot, but instead are limited to an administrative proceeding followed by judicial review as provided in NRS Sections 463.361 to 463.3668." Pet. App., C2.

The district court also held that because the Ericksons had not yet exhausted the remedies provided in the Nevada statutes, it lacked subject matter jurisdiction over their first four claims for relief. Pet. App., C2-C3. Finally, the district court held that it lacked subject matter jurisdiction over the Ericksons' fifth claim, seeking declaratory relief, because the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, did not provide an independent basis for jurisdiction in federal court. Pet. App., C3.

By order entered July 5, 1989, the district court denied the Ericksons' motion for reconsideration. *See* Pet. App., C5-C7. The court rejected the Ericksons' argument that their claim for payment of the jackpot was not an attempt to recover a gaming debt not evidenced by a credit instrument, which would be barred by Nevada law, but instead was a common law action for fraud and cheating that fell outside the bar imposed by NRS 463.361. Pet. App., C6.

The Ericksons appealed only the dismissal of their third claim for relief, alleging fraud and cheating against Caesars, to the United States Court of

Appeals for the Ninth Circuit.[4] The Ericksons argued the claim was not barred by NRS 463.361, but instead fit within an exception for fraud claims that had been judicially created in *Berman v. Riverside Casino Corp.*, 323 F.2d 977 (9th Cir. 1963), and *Zaika v. Del E. Webb Corp.*, 508 F. Supp. 1005 (D. Nev. 1981).

In opposition, Caesars argued first that the appeal was moot, because even if the Ericksons' claim of fraud and cheating stated a claim upon which relief could be granted and were remanded to the district court, it would be precluded by application of the doctrines of *res judicata* and collateral estoppel. Those doctrines would apply, Caesars argued, because the Decision and Order of the Board, made after a full and fair hearing and affirmed by the state district court and the Nevada Supreme Court, expressly rejected the Ericksons' claim to the jackpot based on a theory of fraud, and found that Caesars Palace did not make any false representations to Kirk Erickson.

Caesars also argued that, in any event, the federal district court was correct in holding that the claim was barred by NRS 463.361, and that *Berman* and *Zaika*, which had been decided before the enactment of the statute, were inapplicable.

In an opinion filed August 21, 1991, the court of appeals affirmed the federal district court's dismissal of the Ericksons' claim. *See Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991). Reviewing the district court's decision *de novo*, the court of appeals

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[4] Because the Ericksons did not appeal the dismissal of their claims against the State defendants, the State defendants should not have been appellees before the court of appeals and should not be respondents here.

initially determined that dismissal of the claim for lack of subject matter jurisdiction no longer was valid because the Ericksons had exhausted the remedies provided by Nevada law. *Id.* at 696. The court of appeals held, however, that the district court was correct in concluding the claim was barred by application of NRS 463.361. The court of appeals stated:

> Appellants assert the Nevada statute should not bar this action because it does not involve a "gaming debt." We agree with the district court that "Nevada characteristically categorizes suits to collect unpaid gambling winnings as gaming debts." *Harrah's Club v. State Gaming Control Bd.*, 104 Nev. 762, 766 P.2d 900 (1988); *State Gaming Control Bd. v. Breen*, 99 Nev. 320, 323, 661 P.2d 1309, 1311 (1983); *Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 565 (1971). The district court correctly held that NRS 463.361 to 463.3668 limits a plaintiff's recovery of a gaming debt to the exclusive administrative/judicial review procedure contained therein.

Erickson, 942 F.2d at 696.

The court of appeals also held that *Berman* and *Zaika* were inapplicable. It continued:

> We do not believe the Nevada legislature intended to allow parties to avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings. Under NRS 463.361, parties who assert they are owed a gaming debt, *fraud or no fraud*, are confined to the

> administrative process followed by state judicial review.
>
> Because NRS 463.361 precludes Appellants' fraud action, they have failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). We therefore affirm the decision of the district court.

Erickson, 942 F.2d at 697 (emphasis added). The court of appeals did not reach Caesars' argument respecting the potential *res judicata* and collateral estoppel effects of the state proceedings.

By order entered September 27, 1991, the court of appeals denied the Ericksons' petition for rehearing. *See* Pet. App., F1.

REASONS FOR DENYING WRIT OF CERTIORARI

The Application of Substantive State Law by a Federal Court Exercising Diversity Jurisdiction, to Hold that a Common Law Claim of Fraud and Cheating Fails to State a Claim upon which Relief Can Be Granted, Is Purely a Determination of State Law, to which this Court Has a Practice of Deferring, Is Consistent with the Settled Law of this Court and the Courts of Appeals, and Does Not Deprive the Claimant of any Right under Federal Law.

Plainly and simply, the federal district court and the court of appeals applied substantive Nevada law to the Ericksons' common law claim of fraud and cheating and determined that the claim was barred.[5]

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[5] The court of appeals did *not,* as the Ericksons contend, find that the district court lacked subject matter jurisdiction over the claim; nor did it decide that the claim was precluded by the decisions rendered in the state proceedings. *Compare* Petition, 7-8, 9-10, 12-19, with *Erickson v. Desert Palace, Inc.*, 942 F.2d

The lower courts' determinations of state law were correct, as the authorities they cited reveal. More to the point, this Court has a "practice of deference" to the determinations of state law questions by the district courts and courts of appeals, *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); consequently, there is nothing in the decisions below that merits review.[6] *See also Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988) (this Court has a "settled and firm policy of deferring to

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694 (9th Cir. 1991). Therefore, the Ericksons' arguments pertaining to these two non-issues are not addressed in any detail in this brief. However, the argument made by Caesars to the court of appeals on the question of preclusion does apply with equal force here. That is, even if this Court were to decide that the Ericksons could maintain a civil action for fraud and cheating notwithstanding NRS 463.361, the action would in all likelihood be barred on remand by the findings and conclusion of the Board and the state courts under theories of *res judicata* and collateral estoppel.

In addition to their mischaracterization of the court of appeals' decision, the Ericksons also make numerous factual misrepresentations in the Petition. As the Ericksons themselves acknowledge at page 23 of the Petition, the factual record in this matter consists solely of the allegations in the complaint. As to those allegations, the Board, state district court and Nevada Supreme Court all found them meritless.

Finally, the Ericksons also mischaracterize what transpired in the proceedings before the Board, particularly the hearing examiner's decision concerning the witnesses the Ericksons intended to present. If required, Caesars would show that the Ericksons received a full and fair hearing before the Board and were permitted to call whatever witnesses they pleased.

[6] The Ericksons almost concede as much. They state: "Caesars Palace's alternative [sic] grounds for upholding dismissal of this federal lawsuit would normally not be worthy of consideration by this Court, since it revolves solely around an issue of state law." Petition, 26.

regional courts of appeals in matters that involve the construction of state law"). For this reason, alone, the Petition should be denied.

In any event, there is no offense to federal law or constitutional mandate when a federal court, sitting in diversity, applies substantive state law to bar a state common law claim. On the contrary, the analyses performed and the conclusions reached by the district court and court of appeals in this case are consistent with the settled law of this Court, as well as the courts of appeals.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), this Court held that a federal district court sitting in New York and having diversity jurisdiction over the plaintiff's class action for breach of trust was bound to apply New York's statute of limitations even though it would result in dismissal of the action. This Court stated:

> [S]ince a federal court adjudicating a state-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.
>
> . . .
>
> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. . . .

> [I]f a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery.

Id. at 108-09, 110.

The rule originally stated in *York* was applied by this Court again in *Angel v. Bullington*, 330 U.S. 183 (1947), *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

In *Angel*, this Court held that a federal district court sitting in North Carolina and having diversity jurisdiction could not entertain an action for a deficiency judgment arising out of a Virginia mortgage where a North Carolina statute precluded suits for deficiency judgments.

Similarly, in *Woods*, this Court held that a Tennessee corporate plaintiff could not sue a Mississippi defendant on a Mississippi cause of action in a Mississippi federal court when Mississippi would not allow the corporation to sue in its courts because of the corporation's failure to register as a foreign corporation doing business there. This Court stated:

> Angel v. Bullington in its alternative ground followed the view of Guaranty Trust Co. of New York v. York, . . . that for purposes of diversity jurisdiction a federal court is "in effect, only another court of the State. * * *." . . . The York case was premised on the theory that a right which local law creates but does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that *where in such cases one is barred from re-*

> *covery in a state court, he should likewise be barred in the federal court.*

Woods, 337 U.S. at 538 (emphasis added; citation omitted); *see also* C. Wright, *The Law of Federal Courts* § 46 (4th ed. 1983) ("[i]f a state closes its doors to a particular class of litigant or claim, a federal court, exercising diversity jurisdiction, cannot entertain a suit by such a litigant or on such a claim").

And in *Ragan*, this Court held that a Kansas statute, which did not toll the applicable statute of limitations until the summons and complaint were served, applied to defeat a diversity action for personal injuries brought in a Kansas federal court where the summons and complaint were not served until after the statute of limitations had run, even though Rule 3 of the Federal Rules of Civil Procedure would have tolled the statute upon the filing of the complaint. This Court stated: "We cannot give [a cause of action] longer life in the federal court than it would have had in the state court without adding something to [it]. We may not do that consistently with Erie R. Co. v. Tompkins." *Ragan*, 337 U.S. at 533-34.

As this Court has observed, Congress, in providing the statutory basis for diversity jurisdiction, "afforded out-of-State litigants another tribunal, not another body of law." *York*, 326 U.S. at 112.[7]

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[7] What became known as the "outcome determinative" test of *York* was modified by this Court in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and *Hanna v. Plummer*, 380 U.S. 460 (1965). Even as modified by these decisions, however, the basic rule established in *York* and followed in *Angel*, *Woods* and *Ragan* is controlling here.

The federal courts of appeals have consistently followed the pronouncements of this Court in *York*, *Angel*, *Woods* and *Ragan*. *Cf. Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (state law applied to cap damages in medical malpractice action tried to federal district court sitting in diversity); *In re Asbestos Litig.*, 829 F.2d 1233 (3d Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (state law applied to prohibit assertion of "state-of-the-art" defense in products liability action brought in federal court sitting in diversity); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362 (6th Cir. 1984) (state statute of repose applied to bar action for construction defects brought in federal court sitting in diversity); *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407 (7th Cir. 1984) (state worker's compensation act, which vested exclusive jurisdiction over workers' claims for job-related injuries in state industrial board, applied to bar worker's action for job-related injury brought against employer in federal court sitting in diversity); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982) (same); *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981) (state guest passenger rule applied to bar wrongful death action brought in federal court sitting in diversity).

The application of Nevada law on gaming debts to bar the Ericksons' common law claim of fraud and cheating is consistent with these precedents. Just as importantly, and contrary to the principal argument in the Petition, it does not deprive the Ericksons of any right under federal law. Specifically, it does not deprive them of any right to a jury trial or punitive damages.

Whether a party has a right to a jury trial in federal court is a matter of federal law. *Simler v. Conner*, 372 U.S. 221, 222 (1963). In *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), this Court held that the Seventh Amendment right to trial by jury in a civil action is not violated where a state abolishes a right of action, leaving nothing for trial by jury. *Id.* at 235. "In other words, if the cause of action is completely done away with, then the right to trial by jury becomes completely irrelevant. Since the right attaches to civil trials, there can be no right—and no constitutional violation—if no civil trial is available." *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 651, 771 P.2d 711, 719 (1989).

Whether a party has a right to recover punitive damages in a federal court sitting in diversity is a matter of state law. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). Under Nevada law, "[a] plaintiff is *never* entitled to punitive damages as a matter of right." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 451, 514 P.2d 1180, 1182 (1973) (emphasis added); *see also Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 829 (1962) ("[c]ompensatory damages must be awarded before a recovery of punitive damages is authorized").

Thus, because the Ericksons are barred by Nevada law from pursuing their claim of fraud and cheating, they have no corresponding right to a jury trial or punitive damages.

Finally, this Court has held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v.*

Silver, 280 U.S. 117, 122 (1929); *see Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *see also Martinez v. California*, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational").

In this case, NRS 463.361, which was relied upon by the federal district court and the court of appeals, merely codified part of the longstanding common law rule in Nevada that all gaming debts are void and unenforceable. *Compare* 1983 STATUTES OF NEVADA, Ch. 582 (codified as NRS 463.361 through 463.366), *with Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 656 (1971), *Weisbrod v. Fremont Hotel, Inc.*, 74 Nev. 227, 326 P.2d 1104 (1958), and *Scott v. Courtney*, 7 Nev. 419 (1872). However, to the extent the statute could be perceived to have "abolished" the Ericksons' common law cause of action for fraud and cheating, and substituted an administrative remedy followed by state court judicial review in its place, such legislation is constitutionally permissible. *Silver v. Silver*, *supra*; *see also New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (upholding constitutionality of New York's worker's compensation scheme which, in lieu of common law liability to injured employee for act of negligence, imposed administratively regulated remedy of employer liability without regard to negligence based on the employee's loss of earning power).

CONCLUSION

The application of substantive state law to bar the Ericksons' claim of fraud and cheating is consistent

with the settled law of this Court, as well as the decisions of the courts of appeals, and does not deprive the Ericksons of any right under federal law or raise any other federal issue.

The Ericksons' true disagreement is with the determination by the district court and the court of appeals that NRS 463.361 applied to their claim of fraud and cheating in the first instance. *See* Petition, 20-26. However, this Court has a "practice of deference" to the determinations of state law questions by the district courts and courts of appeals. Just as importantly, the determinations of state law by the lower courts in this case were correct, which obviates any possible need for review. Accordingly, the Ericksons' petition for a writ of certiorari should be denied.

Respectfully submitted,

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DISTRICT COURT

CLARK COUNTY NEVADA

Case No. A270429
Department Fourteen

RUSSELL ERICKSON, et al,

Plaintiffs,

vs.

CAESARS PALACE,

Defendant.

REPORTER'S TRANSCRIPT
OF
EVIDENTIARY HEARING

BEFORE THE HONORABLE DONALD M. MOSLEY,
DISTRICT JUDGE

Tuesday, June 27, 1989

APPEARANCES:

For the Petitioners: James P. Sitter, Esquire

For the Respondents: Robert D. Faiss, Esquire
Marc H. Rubinstein, Esquire

For the Gaming Control Board: Gloria Stendardi, Esquire

Reported by: Sharon J. Thielman, CSR No. 72

* * *

[P. 47] THE COURT: Thank you, Mr. Sitter. Thank you very much. Concerning the statute in question, 463.350,

Mr. Sitter points to subsection 1(a) where it is stated that, and I am paraphrasing, "A minor shall not be allowed to play." That does not say collect gaming proceeds. To my mind, the word play as used in that provision of the statute implies both winning and losing and that is the essence of play in that context.

Moving to (b) of that same subsection, Mr. Sitter asks why there should be a distinction in (b) where it says in fact that a person shall not be allowed—a minor should not be allowed to collect winning wagers and that provision actually specifically prohibits the collecting of winning wagers and the argument is why is it not specifically prohibited collecting proceeds from play in the sentence above it.

I think one very logical explanation for that distinction is that wagers must be collected, affirmative act, whereby slot machine winnings are paid automatically in many instances and in fact most instances so I think that could be an explanation and that is my view of the pertinent part of those two provisions.

I would point out that the fact that a statute has been changed does not necessarily mean that it was invalid in its original version. And in my view the statute as it [P. 48] originally appeared was not invalid.

Concerning the question of what actually occurred on the premises at the time of the winning of the jackpot, I would concede, as I think probably the hearings [sic] examiner would concede, that a casino knowingly allowing a minor to gamble and lose, and then disallowing the collection of any winnings that the minor would have, would be fraudulent and would be reprehensible. In this matter, there is no evidence of that.

There is scant indication, if it can be construed as that, that the casino knew or should have known that Mr. Erickson was a minor. I am referring to the keno situation. The evidence in part that I have looked at and reviewed

and heard argued here was that Kirk and his father were in the casino for some time over a period of two days; that the father in fact ultimately tried to collect the jackpot for his son; that there were signs in the area suggesting and very plainly pointing out the fact that people under the age of 21 years should not gamble and that the evidence of Mr. Erickson's appearance was heard by the hearings officer. This is just part of that which is in the transcript.

There has been some mention of public policy in argument here. And the question that comes, I think, should a person be allowed to profit from their unlawful acts and there is no question that a minor gambling is a misdemeanor in this [P. 49] jurisdiction. And I think also the question of whether an individual should be able to profit or utilize as a defense lack of knowledge of a particular law prohibiting such, in this case prohibiting gambling underage I don't know that the hearings examiner contemplated those particular issues but I think they have been argued here inferentially at least.

In my view, sufficient evidence is present to cause to have confirmed the decision of the hearings examiner and I so confirm. Is there anything further, gentlemen, ladies? Court is adjourned.

* * * * *

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CASE NO: CV-S-88-660-LDG LRL

RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON,

Plaintiffs,

vs.

DESERT PALACE, INC.; CAESARS PALACE, a Nevada corporation; CAESARS PALACE CORPORATION, a Delaware corporation; DONALD ABRAHAMSON; MARIAN VINCE, formerly known as MARIAN FOURNO; STATE OF NEVADA; and NEVADA GAMING CONTROL BOARD,

Defendants.

COMPLAINT

JURY TRIAL DEMANDED

JURISDICTION

1. This is an action based upon diversity of citizenship and the court has jurisdiction pursuant to 28 U.S.C. Section 1332.

2. Plaintiffs RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON are citizens of the State of Arkansas. Defendant DESERT PALACE, INC., is a Nevada corporation. Defendant CAESARS PALACE is a Nevada corporation. Defendant CAESARS PALACE CORPORATION is a Delaware corporation duly licensed to conduct business in the State of Nevada. Defendants [sic] STATE OF NEVADA, by and through its agency, the NEVADA GAMING CONTROL BOARD, regulates gaming in Nevada. Defendants DONALD ABRAHAMSON and MARIAN VINCE, formerly known as MARIAN FOURNO, are agents of the said NEVADA GAMING CONTROL BOARD and are citizens of the State of Nevada. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

FIRST CLAIM FOR RELIEF

(BREACH OF CONTRACT)

3. In doing or omitting to do each of the acts or omissions alleged herein, each Defendant was the agent, servant and employee of each other Defendant and was acting within the scope of his, her or its agency and employment.

4. At all times relevant hereto, Defendants DESERT PALACE, INC., CAESARS PALACE, and CAESARS PALACE CORPORATION, referred to collectively hereafter as "CAESARS PALACE," owned, managed and/or were responsible in some manner for the operation of the hotel and casino more commonly known as CAESARS PALACE, which is located at 3570 South Las Vegas Boulevard, Las Vegas, Clark County, Nevada.

5. At all times relevant hereto, Defendants DONALD ABRAHAMSON and MARIAN VINCE were employed by the State of Nevada as Gaming Control Agents, and purported to act in the course and scope of said employment.

6. Plaintiffs RUSSELL ERICKSON and BETH ERICKSON are and were at the time of the incident complained

of herein husband and wife. Plaintiff KIRK ERICKSON is their son and, at the time of the incident complained of herein, was approximately 19 years of age. During the summer of 1987, Plaintiffs decided to spend part of their annual vacation in Las Vegas, Nevada, and while there to gamble in the casinos of Nevada. They agreed that Plaintiff RUSSELL ERICKSON would provide the necessary funds for gambling, and that if there were any winnings, all such winnings would be placed in a pool and divided equally between [sic] them.

7. At the time of entering into the aforesaid agreement, and at all times until the incident complained of herein, based upon their knowledge of gambling laws in their home state of Arkansas as well as other states, and the failure of Defendants to indicate a contrary gambling age in Nevada, Plaintiffs believed that the legal gambling age in the State of Nevada was 18 years.

8. On or about August 5, 1987, Plaintiffs, together with Jennifer Erickson and Brandee M. Head, both 15 years of age, arrived in Las Vegas and checked into the hotel at Caesars Palace. After sleeping, RUSSELL ERICKSON and BETH ERICKSON went down to the swimming pool of the hotel and casino, where they were subsequently joined by KIRK ERICKSON. While at the swimming pool, the Plaintiffs, including KIRK ERICKSON, played several games of Keno. Subsequently, KIRK ERICKSON went into the casino and began to play the slot machines. He was joined later by his parents.

9. Using the appropriate coins and tokens which KIRK ERICKSON repeatedly purchased from personnel of Defendant CAESARS PALACE, KIRK ERICKSON played the slot machines for approximately 45 minutes to an hour. He placed the coins or tokens into the machine and when a winning combination appeared on the machine, he was paid the sum that he had won directly by the machine. Finally, while playing a bank of slot machines known as

"Million Dollar Baby", Plaintiff hit a jackpot which, according to the instructions on the machine, would be paid by an attendant. When an attendant failed to respond to his call for assistance, KIRK ERICKSON called his father to watch the machine while he went to find an attendant. While he was gone, an attendant appeared and told RUSSELL ERICKSON that he was a big winner, that he had won $1,061,812.00. Upon hearing this, and feeling satisfied that his father was taking care of the situation for him, KIRK ERICKSON left the area to telephone his relatives and advise them of his good fortune.

10. Ultimately, Defendant CAESARS PALACE refused to pay, and continues to refuse to pay, the subject winning jackpot to the Plaintiffs, or any of them, claiming as the basis therefor that KIRK ERICKSON was under age.

11. The Defendant CAESARS PALACE knew or should have known that Plaintiff KIRK ERICKSON was under the legal gambling age in the State of Nevada, but at no time prior to KIRK ERICKSON gambling at the Casino did any representative thereof advise him or any member of the Plaintiffs' party, by any means whatsoever, of the legal gambling age in Nevada or that he was not of legal gambling age in the State of Nevada, nor did they ask for any identification from him showing his age, object to his gambling or attempt to stop the same; rather, Plaintiff KIRK ERICKSON was repeatedly offered alcoholic beverages and implicitly was encouraged and provided the opportunity to gamble.

12. Defendant CAESARS PALACE entered into a contract with Plaintiff KIRK ERICKSON at the time of selling him the tokens that were legal only for the purpose of gambling in the establishment of Defendant CAESARS PALACE and if he used said tokens in a game or slot machine and obtained a winning result therefrom, Defendant CAESARS PALACE would pay the sum won by Plaintiff KIRK ERICKSON; when Defendant CAE-

SARS PALACE permitted Plaintiff KIRK ERICKSON to play the slot machines without objection thereto, it confirmed the terms of the aforesaid contract; by refusing to pay the winnings after just demand was made therefor by Plaintiffs, Defendant CAESARS PALACE did breach their [sic] contract with the Plaintiffs.

13. By reason of the aforesaid breach of contract, Plaintiffs seek an award for their losses in the amount of $1,061,812.00 and interest at the maximum legal rate accruing from the date of breach, plus other consequential damages, the amounts of which are yet to be determined.

14. It has been necessary for Plaintiffs to retain counsel to bring this action and they are entitled to an award of attorneys' fees in addition to the other relief sought herein.

SECOND CLAIM FOR RELIEF

(QUASI-CONTRACT)

15. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 14 as though fully set forth herein.

16. That prior to "hitting" the aforesaid jackpot, Plaintiff KIRK ERICKSON had deposited a substantial sum of money in the slot machines of Defendant CAESARS PALACE, relying upon the pay-out displays shown on the machines to the extent that if the pull of the handle produced a losing combination, he expected to lose the money he deposited and, if a winning combination was produced, he expected to be paid according to the display for the particular combination.

17. Upon being advised that they had won the large jackpot, Plaintiff RUSSELL ERICKSON gave several large tips to members of the staff of the Defendant CAESARS PALACE and Plaintiff KIRK ERICKSON made long distance calls to friends and/or relatives to tell them of his good fortune; Plaintiffs would not have so acted but for

the representations to them by members of the staff of CAESARS PALACE that they had won the large jackpot.

18. That the slot machines in CAESARS PALACE are set to pay a jackpot only after a substantial amount of money has been deposited into the bank of slot machines; that Defendant CAESARS PALACE advertises and represents to its patrons that they retain only a small amount of the money deposited in said slot machines; that Defendant CAESARS PALACE makes no effort to inform its patrons of the legal gambling age or to prohibit gambling by those who are under age; that Defendant CAESARS PALACE profits more from allowing an underage person to gamble as from a gambler of legal age; and that to allow Defendant CAESARS PALACE to retain the proceeds of the jackpot, plus any other monies deposited in said slot machine by Plaintiffs, would unjustly enrich said Defendant and reward it for its neglect or failure to enforce the gaming laws of the State of Nevada.

19. By reason of the aforesaid detrimental reliance by Plaintiffs upon the displays shown on the slot machines and upon the conduct and express representations of agents of Defendant CAESARS PALACE, and/or the unjust enrichment of said Defendant by its refusal to pay the jackpot, Plaintiffs seek an award of compensatory damages in the amount of $1,061,812.00, plus interest and consequential damages in an amount as yet to be determined.

THIRD CLAIM FOR RELIEF

(FRAUD AND CHEATING)

20. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 19 as though fully set forth herein.

21. Gambling by those under the lawful age in a casino operated by Defendant CAESARS PALACE is commonplace.

22. As a matter of policy, Defendant CAESARS PALACE does not adequately nor competently advise its patrons of the lawful gambling age, nor enforce the Nevada law restricting gambling by those who are under age.

23. By reason of its knowing and willful failure to disclose the lawful age for gambling and to regard and enforce the terms thereof, Defendant CAESARS PALACE encourages gambling in its casino by minors, and profits therefrom through all the fraudulent acts alleged above. In conjunction with "bad faith" reliance upon the alleged orders of gaming control agents not to pay major jackpots to minors, Defendant CAESARS PALACE is unconscionally [sic] allowed to increase its profit margin illegally under normal gaming rules.

24. That by allowing Plaintiff KIRK ERICKSON to purchase gaming tokens for use in the slot machines and allowing him to play the slot machines, both without objection, Defendant CAESARS PALACE did represent to Plaintiff KIRK ERICKSON that he had the same opportunity as anyone else to win a jackpot; that CAESARS PALACE did not intend to pay a jackpot if it were won by a minor; that said misrepresentation was knowingly and willfully made for the purpose of defrauding and cheating Plaintiffs and other underage gamblers.

25. Plaintiffs, and KIRK ERICKSON specifically, relied to their detriment with respect to Defendant's representations as to jackpot payoffs. Had Plaintiffs known the true facts with regard to Defendant's false representations, the subject incident would not have occurred.

26. For such knowing and intentional fraud and cheating, Plaintiffs seek an award of compensatory damages in the amount of $1,061,812.00, consequential damages in an amount yet to be determined, and exemplary damages in the amount of $20,000.00.

FOURTH CLAIM FOR RELIEF

(INTERFERENCE WITH CONTRACT)

27. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 26 as though fully set forth herein.

28. That Defendants STATE OF NEVADA, its agency NEVADA GAMING CONTROL BOARD, by and through their agents DONALD ABRAHAMSON and MARIAN VINCE, while purportedly acting in their role as Gaming Control Agents for the State of Nevada, did exceed the scope of their lawful authority and by means of threats, harassment and intimidation did endeavor, coerce and compel Plaintiffs to withdraw their lawful claim for their jackpot winnings.

29. That said Defendants ABRAHAMSON and FOURNO have not and did not at any time attempt to enforce the lawful age limitation of those persons gambling at the CAESARS PALACE CASINO, except in an arbitrary and capricious effort to deny Plaintiffs the proceeds of their jackpot.

30. That the aforesaid acts and omissions of Defendants ABRAHAMSON and FOURNO were done negligently, intentionally, knowingly, willfully and oppressively, and with reckless disregard of the Plaintiffs' rights. That by reason of the aforesaid, Defendants ABRAHAMSON and FOURNO interfered unlawfully with the contractual relationship between Plaintiffs and Defendant CAESARS PALACE concerning payment of the winning jackpot.

31. By reason of the aforesaid acts and omissions of Defendants ABRAHAMSON and FOURNO, Plaintiffs seek an award against them, and each of them, of compensatory damages in the amount of $1,061,812.00 plus consequential damages in an amount as yet to be determined.

FIFTH CLAIM FOR RELIEF

(DECLARATORY JUDGMENT)

32. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1 through 31 as though fully set forth herein.

33. Notwithstanding valid jurisdiction alleged in Paragraph 1, Plaintiffs are entitled to declaratory and further relief pursuant to 28 U.S.C. Sections 2201 and 2202, and are desireous [sic] of subjecting the statute and its enforcement procedures to close scrutiny.

34. The statute in question, Nevada Revised Statute 463.350, states in pertinent part:

> "1. A person under the age of 21 years shall not:
>
> (a) Play, or be allowed to play, any licenced [sic] game or slot machine.
>
> ***
>
> 2. Any licensee, employee, dealer or other person who violates or permits the violation of any of the provisions of this section and any person, under 21 years of age, who violates any of the provisions of this section is guilty of a misdemeanor.
>
> 3. And for any prosecution or other proceeding for the violation of any of the provisions of this section, it is no excuse for the licensee, employee, dealer or other person to plead that he believed the person to be 21 years old or over."

35. The above statute is criminal in nature and offers no further guidance relative to further sanctions in the event that a minor is allowed to gamble and subsequently wins.

36. The Nevada State Gaming Regulations offer no further guidance concerning what actions are to be taken relative to money lost by minors, or jackpots won by minors.

37. Plaintiffs contend that the STATE OF NEVADA, by and through its regulatory agency, the GAMING CONTROL BOARD, and its agents, arbitrarily and capriciously interpret the said statute to provide further sanctions, which only work to the benefit of the licensee, and to the detriment of any unfortunate minor who happens to play.

38. The fact situation in this case is a perfect example of said arbitrary and capricious application of the statute concerning the gambling by minors since it is apparent to Plaintiffs that the only time said statute is enforced is in the event that a minor wins.

39. To Plaintiffs' knowledge and belief, no citations were issued nor fines levied by the GAMING CONTROL BOARD against CAESARS PALACE for this statutory violation.

40. In addition to the arbitrary and capricious enforcement policies by the GAMING CONTROL BOARD in its application of the subject statute, said Board, despite any specific guidelines in its regulations, is certainly overreaching the stated bounds of said statute in its alleged Order to CAESARS PALACE directing said licensee NOT to pay the subject jackpot.

41. In essence, it appears to be the policy of the State Gaming Control Agency to protect the casinos, and the casinos only, in derogation of the true intent of the Gaming Control Statutes in general, and certainly to the detriment of the very party for whose benefit the statute was enacted, the public in general and, in this case, minors.

42. That, although there are so-called "administrative remedies" available, Plaintiffs are reluctant to have this matter heard before a hearing officer of the very agency which is arbitrarily, capriciously, and in an over-reaching

fashion, interpreting and allegedly enforcing NRS 463.350. Further, neither the statute nor the gaming regulations themselves provide any guidance for said hearing officer, thus subjecting Plaintiffs to further potential for arbitrary and capricious interpretation of the statute.

43. It is Plaintiffs' further contention that both Defendants CAESARS PALACE and the STATE OF NEVADA, by and through the NEVADA STATE GAMING CONTROL BOARD and its agents, negligently, deliberately, intentionally, collusively and perhaps maliciously, simply do not enforce the said statute since considerable revenues are derived from minors' play, and the very fact that this event happened, and on the very face of the GAMING CONTROL BOARD's actions, is proof positive that the subject statute offers no guidance and leaves room for further arbitrary and capricious and over-reaching enforcement applications by Gaming Control Agencies, as well as engenders malicious and fraudulent conduct on the part of the licensees. It is therefore necessary to have these laws and policies and their application and enforcement procedures delved into by this Court prior to any further injustices brought by these so-called "administrative remedies".

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Compensatory damages against the Defendants, and each of them, in the amount of $1,061,812.00, plus consequential damages in an amount yet to be determined.

2. An award of exemplary damages against Defendant Caesars Palace in the amount of $20,000,000.00.

3. A declaratory judgment finding the subject statute as it is presently being implemented and enforced to be unconstitutional on its face or unconstitutional in its application.

4. An award of their costs, reasonable attorney fees, interest, and such other and further relief as the Court deems just and equitable in the premises.

DATED this 11th day of August, 1988.

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